

REMARKS

Claims 1, 3-23, and 25-61 are pending. Of these, claims 1, 3-23, and 42-45 are allowed, and claims 26, 28, 30, 33-36, and 39-41 are objected to. Claims 25, 27, 29, 31-32, 37-38, and 46 stand rejected. Claims 47-61 have been withdrawn from consideration.

Claims 25, 27, 29, and 31 stand rejected under 35 U.S.C. §102(a) as being anticipated by the French patent to Conchy (FR 2,817,463).¹ Claim 25 is directed to a device for spacing vertebral members. Claim 25 has been amended to recite that the first and second members include an elongated shape with a free distal end and a free proximal end that face in opposing directions. The claim has further been amended to include that each of the members includes a longitudinal axis that extends through the ends and through the ramps. Conchy, in contrast, discloses an intervertebral implant comprising a plurality of circularly-shaped elements. "Circular" is not "elongated," and no one of ordinary skill in the art would believe that it is. Further, Conchy does not include a longitudinal axis that extends through the ends and through the ramps. For at least these reasons, Conchy does not anticipate claim 25 or any of its dependent claims.

Claims 32, 37, 38, and 46 stand rejected as being obvious over Conchy in view of Brantigan (U.S. Pat. 4,878,915).² Claim 32 is directed to a device to space vertebral members and recites that the first and second members each include an elongated shape with opposing distal and proximal ends. Claim 32 has been amended to now include that each of the members includes a longitudinal axis that extends through the ends and the ramped surfaces. Conchy does not teach or suggest first and second members having an elongated shape. Further, Conchy discloses circular elements that do not include a longitudinal axis that extends through the ends and the ramped surfaces. Nor does Brantigan, and the Office Action does not

¹ Applicant notes that the analysis and discussion of Conchy is based on the U.S. equivalent of the cited French patent – U.S. Pat. App. Pub. No. 2005/0107878.

² The Office Action mistakenly identifies Brantigan as U.S. Pat. No. 4,787,915.


allege that it does. In fact, the Office Action cites Brantigan only for its alleged teaching of a delivery device. For at least these reasons, both Conchy and Brantigan alone fail to teach or suggest this element of claim 32, and as such, the combination of Conchy and Brantigan also fails.

Claim 37 is directed to a device to space vertebral members. The claim has been amended to now include that the spacer has an elongated length with opposing first and second ends. Conchy does not teach or suggest a spacer having an elongated length with opposing first and second ends. Brantigan also fails to teach or suggest this element of claim 37. Claim 37 has also been amended to now include that the spacer has a greater height and length in the open orientation than in the closed orientation. Conchy discloses overlapping circular rings that are rotated relative to each other to increase the size of the combined device in one direction (e.g., the height). The corresponding circular shapes and the overlapping positions do not provide for an increase in size in a second dimension. Brantigan also does not disclose or suggest this aspect. For at least these reasons, claim 37 and its dependent claims are non-obvious over the cited art.

Finally, claim 46 is directed to a device to space vertebral members. Claim 46 recites a delivery device having an elongated shape with a first end pivotally connected to the deploying member. The Office Action acknowledges that Conchy does not teach or suggest this element, but alleges that Brantigan does. However, Brantigan discloses a tool for placing an implant (referred to as a "plug" 11) between adjacent vertebrae. Although the tool connects to the plug, it does not pivotally connect to the plug, as claimed. Rather, the tool threadingly engages a "receiving recess" bored into the plug. *Brantigan*, col. 5, ll. 28-34. Thus, the tool simply threads into the threaded hole formed in the plug. There is no "pivoting" movement in Brantigan. For at least this reason, neither Conchy nor Brantigan teach or suggest, alone or in combination, claim 46 or any of its dependent claims.

In view of the above amendments and remarks, the Applicant submits the present application is in condition for allowance, and such action is respectfully requested.

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